

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS (Boston)

UNITED STATES OF AMERICA

vs.

SEAN O'DONOVAN

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For Hearing Before:
Judge William G. Young

Motion to Suppress

United States District Court
District of Massachusetts (Boston.)
One Courthouse Way
Boston, Massachusetts 02210
Monday, December 19, 2022

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P R O C E E D I N G S

(Begins, 2:00 p.m.)

THE CLERK: Now hearing Criminal Matter 22-10141, the United States of America versus Sean O'Donovan.

THE COURT: Good afternoon. Would counsel identify themselves.

MS. BARCLAY: Good afternoon, your Honor,
Christina Barclay for the United States.

MR. WEINBERG: Good afternoon, your Honor, Martin Weinberg on behalf of Sean O'Donovan, who sits to my right, your Honor.

THE COURT: Yes. Mr. Weinberg, I will hear you. I will -- I think I should say that having looked at Judge Saris's careful analysis, you would seem to have an uphill climb.

MR. WEINBERG: Yes, and I realize that on December 2 the phone cap speaker, and I was going to advise the Court and Ms. Barclay that --

THE COURT: I'm sure you would, that's not the point, but just that that analysis commends itself to the Court.

MR. WEINBERG: Yes, and I'm going to spend a few minutes on that issue, which is one of three issues.

THE COURT: Go ahead.

MR. WEINBERG: There's the general warrant issue

1 that Judge Saris addressed -- and I can't make an
2 argument that the type of warrant that she addressed in
3 **Klyushin** is meaningfully different than the warrants,
4 the four warrants here. I'm not making factual
5 distinctions, I'm appealing to you as a co-equal judge
6 to consider that, with all due respect to the former
7 Chief Judge, I don't think she got it right here. And
8 I'll spend about 2 minutes doing that.

9 THE COURT: Go right ahead.

10 MR. WEINBERG: And then I'll go to probable cause,
11 and then I'll go to the lack of particularity in the
12 second part of the warrants, which is what can the
13 government search the documents that the ISP's -- Apple
14 have provided.

15 In terms of the general warrant issue, you know I
16 raise it because -- you know not to be dramatic, but you
17 know we work about a mile from the gravestone of James
18 Otis, who's buried right across from the Parker House,
19 and he's the Founder of the Fourth Amendment, and when I
20 had an opportunity at one time to argue to the Supreme
21 Court on a Fourth Amendment issue back in 1977 and '8,
22 and it came from Judge Tauro's granting the suppression
23 and the First Circuit adopting it and Department of
24 Justice appealing it and it turned out to be a 7 to 2
25 opinion in **Chadwick** that Justice Berger wrote. And it

1 dealt with the idea is the search warrant issue, the
2 warrant clause limited to the home or does it extend to
3 papers, and in that case it was a Footlocker at South
4 Station?

5 The whole history of the Fourth Amendment is a
6 railing by the Founding Fathers against writs of
7 assistance where they went into warehouses and took
8 everything, and later the customs people and the
9 sovereigns, men would go through and decide, "Well
10 that's criminal" and "That's not criminal.

11 In **Chadwick** the government said the warrant clause
12 should be limited to the home. And when you read
13 Justice Berger's decision, and I reread it last night,
14 it quoted back to the seminal cases that said mail and
15 papers and messages are as protected as the home. And
16 here the government wouldn't come before the Court, I
17 don't think, and say, "Give me a search warrant that I
18 can serve on the U.S. Postal Inspectors, or the FedEx,
19 or UPS, that allows them to open every package and give
20 us every package, because of course texts and e-mails
21 don't have the same closure that letters and packages
22 do.

23 And the real issue is why isn't the government
24 required and ordered not to seize this limited -- this
25 limitless archive of messages, e-mails, location data,

1 Google searches? Why would they not be required to tell
2 Apple or tell AT & T or tell Google, "We want only the
3 messages that conform to probable cause," "Give us
4 everything to do with that, give us every communication
5 where the CHS, whose name is --

6 THE COURT: But isn't the answer to that the
7 practical answer in today's world where, um -- to work
8 backwards, the government will only be able to use --
9 now this is not the most persuasive argument, because
10 the problem with the search is the search. But they
11 have these and they have in this case, via Judge
12 Cabell's order, they have their filter teams doing the
13 job and excluding, um, from the search, as I understand
14 it, Mr. O'Donovan is a member of the profession, he is
15 bound to keep confidential various communications with
16 his clients that have nothing to do with the alleged
17 criminal activity. They're not allowed to use that.
18 But as a practical matter it's something like a wiretap,
19 they have to see what they've got to then minimize, to
20 exclude those things that don't have anything -- don't
21 bear on the alleged criminality here.

22 MR. WEINBERG: And my contention would be, Judge,
23 that in this world where an -- where an iCloud contains
24 everything, and here the only limit on what they
25 instructed Apple to do, "Give us everything" -- and a

1 date link, Apple ignored the date link, it so happened
2 they gave the government more than they asked for. But
3 there was no subject matter limitation. It was not
4 saying to Apple, "We want all of the messages, all of
5 the e-mails between Mr. O'Donovan and the following 10
6 people." Instead they took everything. And that's a
7 seizure, that's a government seizure, all e-mails, all
8 texts, all iCloud, limited only by a name.

9 And I respectfully contend, and I know this
10 Circuit's decided you can do that with a phone in **Upham**,
11 you know 19 years ago, and Judge Gorton decided you
12 could do it with an e-mail account. And in another case
13 I had, **Kanodia**, Judge Saris the other day in **Klyushin**.
14 But I think it's an important issue for the Circuit to
15 deal with straight on. They came close to it in
16 **Aboshady** where the lawyer wasn't pressing the issue I'm
17 pressing, a general warrant on the first level, he was
18 talking about retention. But I would respectfully
19 request that your Honor grant it, but I understand if
20 you're going to adopt Judge Saris's analysis, I'm saving
21 it for an appeal.

22 THE COURT: You are and very skillfully too. I
23 had a general warrant case back when I was a Superior
24 Court judge and when, um, District Attorney Droney was
25 the District Attorney in Middlesex and he had an

1 obscenity prosecution against a bookstore in Lowell.
2 And he had a rather -- it had to do with the execution
3 of the warrant, he had a more specific warrant. And as
4 you've talked about warehouses, because I looked at the
5 history too, they went in and took everything. I
6 specifically have in mind they took "Cosmopolitan."
7 But, um, that case, early in my judicial tenure, caused
8 me to reflect on general warrants.

9 Well you've explicated the law. What else have
10 you got here?

11 MR. WEINBERG: Okay.

12 Second, is the second search, your Honor, which
13 the government, you know, first gets everything from the
14 ISP and then they tell the law enforcement officers,
15 "You are to look for evidence of bribery as to the
16 following 8 or 9 categories." And there are two
17 categories that I think are particularly significant in
18 exceeding any alleged probable cause.

19 One is "Contacts with or about public officials
20 who are influencing their authority under the licensing
21 for approval of a marijuana establishment." That's
22 Paragraph 2. The first one is for Medford, I get it,
23 "If they satisfy you, there's probable cause." That's
24 squarely within the probable cause.

25 To then say because there's these communications

1 with Medford, therefore we can go rummaging through his
2 phone for every contact with every public official," I
3 don't believe is supported by probable cause and
4 therefore I think it's overbroad and should not be
5 authorized by the Court. I think it should be narrowed
6 to "So the objects conform to the probable cause."

7 Another one, which some judges, including your
8 Honor in **Levasseur**, has been critical of is the request
9 -- any evidence regarding the target accounts only,
10 meaning Mr. O'Donovan's state of mind as it relates to
11 the crimes under investigation.

12 Well, your Honor, you know warrant enforcement
13 officers are not psychologists, they go and look at
14 every state of mind, that's fairly delinked from hard
15 probable cause, which is communications with a public
16 official about a client in question. And there was one
17 client, there's one public official that the government
18 alleged where conversations went from, they claim, from
19 legal to, they claim, illegal.

20 So I ask your Honor to look at Attachment B and
21 determine whether or not it's overbroad and beyond the
22 probable cause set forth in the affidavit.

23 THE COURT: Um, I had not thought of **Levasseur**,
24 but you bring it back to mind. My problem in **Levasseur**,
25 which is a domestic terrorism case which resulted in a

1 not-guilty and a hung jury, so we don't know what the
2 basic facts were. I was concerned about the government
3 trespassing on the free speech concerns because given
4 the valid political expressions of this group, they had
5 various pamphlets and the like, some, which I allowed,
6 "How to make a bomb," um, given the nature of the
7 charges. But it seemed to me that if they were reading
8 what some would consider rather extreme left-wing data,
9 so be it, that's what the First Amendment is all about.

10 But again as a practical matter, aren't you
11 attacking a little early in the sense that if, um --
12 they're not going to be able to use at trial the results
13 of this search unless they, one, fall within your two
14 challenged criteria, and more than that are relevant
15 evidence.

16 Is that an inappropriate way to analyze it?

17 MR. WEINBERG: No. And contrasted to my first
18 argument with the general warrant where there would be
19 total suppression, your Honor is quite right, this is
20 surgical expression of exhibits that might be offered by
21 the government. I've got a pretrial duty and I don't
22 want to waive this Fourth Amendment issue, so I'm
23 raising it at this time, but not at all disputing that
24 your Honor has the discretion to reserve that analysis.

25 THE COURT: And the third point?

1 MR. WEINBERG: The third point is probable cause.
2 I'm anxious to read to your Honor the Supreme Court's
3 oral argument in the **Rococco** case, which was argued to
4 the Supreme Court on November 28, because it's very
5 relevant to what divides the government and
6 Mr. O'Donovan, and it's relevant and applicable to the
7 warrants, because the first three affidavits are based
8 on the first 7 conversations before they really started,
9 you know feeding Mr. O'Donovan scripts they asked him to
10 adopt or dispute certain fictional statements they made.
11 Here is Justice Alito saying to the Solicitor General,
12 and the Solicitor General's answer is the answer of the
13 government.

14 So let's say this person is a childhood friend of
15 the person. And again we're dealing here with
16 Mr. O'Donovan's request to have a relative of a public
17 official lobby the public official. Let's say this
18 person is a childhood friend of a person, an elected
19 public official. They played together in a high school
20 football game. This person was the elected official's
21 best man, his maid of honor at his wedding. Spearheaded
22 the person's political career. Campaign manager for
23 every campaign. Helped him get elected. Now he's a
24 lobbyist. Lobbyists are lots of public officials, lots
25 of clients. And the Solicitor General says, in answer

1 to the question "Well doesn't the statute -- how far
2 does the sweep of lobbyist goes?" says, "Our position
3 is, as in this case, consistently been that mere
4 influence is not enough to trigger the honest services
5 statute. Even if an individual is influential, even if
6 they're extremely influential, that person doesn't have
7 the indicia of being a government public official." And
8 it's a little different because Rococco is the person
9 receiving the money, not the lobbyist hired to give it.
10 This whole transcript shows that the Court is interested
11 in narrowing, not expanding honest services.

12 When your Honor looks at the affidavits --

13 THE COURT: Well I think that's true. I'm not
14 insensitive that I was the presiding judge in the
15 Probation case, and we see the First Circuit decision in
16 that case driven appropriately by decisions of the
17 Supreme Court. So I'm taking these matters very
18 seriously.

19 MR. WEINBERG: And so here's the government, they
20 start an investigation of a lawyer because the person he
21 chose to lobby was a close relative. And in the first
22 conversation, and they cite it at Paragraph 13 of the
23 first affidavit, and in every affidavit, and I give them
24 credit, to Agent Elio, for being candid with Judge
25 Cabell, this is not a **Franks** argument, this is a facial

1 probable cause argument. He says, quoting
2 Mr. O'Donovan, "Don't ask Jack," who's the public
3 official, "Don't ask Jack for anything." Right in the
4 first tape they're talking about, you know, "We want to
5 ask Jack to give these guys," meaning Mr. O'Donovan's
6 client, "a shake."

7 In the second affidavit they're recording a text
8 that they got from the first seizure, he's talking to a
9 public official saying, "Wait till you see my client's
10 application, it's almost done, it's spectacular, it's
11 going to be almost impossible to deny them unless
12 there's local influence, unless DR, who's the Mayor's
13 Chief of Staff, ducks with CAC." There's another quote
14 saying, "Look, I only want an edge because everybody's
15 trying to get an edge." And then there's all these
16 bolded statements about Mr. O'Donovan offering to pay
17 the relative of the public official, to lobby the public
18 official, as if money -- as if the offer to pay a
19 lobbyist, which is essentially what the relative was, he
20 was asked to advocate or to lobby for the client that
21 Mr. O'Donovan genuinely felt was the best candidate, and
22 if only people read the applications on their merits and
23 local politics didn't enter into it, would have been
24 chosen as they were, as they were chosen.

25 THE COURT: This is a variation, and not even a

1 variation of your motion to dismiss.

2 MR. WEINBERG: It is.

3 THE COURT: And of course when I confronted your
4 motion now to suppress, um, I realized that I can't just
5 kick that ball down the road and say, "Well we'll get to
6 that, we'll decide that someday," I have to decide now
7 whether I'm going to, um, grant or deny the motion to
8 suppress. So you're quite right to raise it.

9 Let me tell you how I've reflected on it, and
10 please address this.

11 As I have reflected on it, I see that the
12 government cites to me accurately cases where the money,
13 the -- where the money passed to a third-party, not for
14 the public official, and under the circumstances of
15 those cases it was enough -- that's why we get the
16 appellate cases, that the factfinder was convinced that
17 the intention was to suborn the conduct of a public
18 official by paying the money, that's how I read those
19 cases. Here that's what they've alleged, it fits the
20 statute.

21 And so I'm thinking, when I come on the bench,
22 Well probably I should deny the motion to dismiss, if
23 I'm going to deny the motion to suppress, but of course
24 we're not clear how this case is going to be defended,
25 and if the government has insufficient evidence for a

1 jury to conclude beyond a reasonable doubt that it was
2 that criminal intention by paying the money, it will
3 be -- and I'll put it on the record right now, it will
4 be my duty under Rule 29 to dismiss -- to grant a
5 directed verdict of acquittal at that point.

6 I'm a pretty transparent person, that's how I came
7 on the bench, that's what I was thinking. And you're
8 directly addressing it.

9 Isn't that the case here? There are these cases.
10 I grant you I have no controlling case, nothing in the
11 First Circuit -- well we'll hear what the government has
12 to say. But as I understand it, nothing that requires
13 that result. But we have these cases and at least as
14 pled the indictment satisfies the statute.

15 MR. WEINBERG: So going back for a second to our
16 last argument, of course the manufactured entrapment
17 argument which your Honor reserved, should still be
18 encouraged to be reserved because it's not to be
19 determined on a probable cause basis or a good faith
20 basis --

21 MR. WEINBERG: Oh, but you see I agree, this is
22 different than entrapment, you see. It may be, and we
23 don't know yet, and we, that is the government nor the
24 judge, I don't know how you're going to present the
25 defense. Entrapment is a different defense in my mind.

1 Here it's a failure of proof.

2 MR. WEINBERG: Yes.

3 THE COURT: A failure of proof because -- against
4 a beyond-a-reasonable-doubt standard, a properly
5 instructed jury could not conclude that the -- that
6 these payments were to suborn the official -- the honest
7 services of the public official. That's the statute.
8 And that's -- if we get to the trial, that's how I would
9 be going into the trial.

10 Now if entrapment is the defense, it's that he
11 was -- entrapment, he has the intention to commit the
12 criminal act, but the government manufactured that
13 intention, he would not have but for the conduct of the
14 government, that's how I understand entrapment. To me
15 the two are different.

16 Am I making myself clear?

17 MR. WEINBERG: You're totally right. And we would
18 not be arguing that he attempted to bribe and should be
19 excused because the government, you know, pressured him.
20 We will be arguing that he had an innocent
21 predisposition and a good faith intent and never
22 intended in any respect to breach honest services. But
23 there will be evidence that the government's scripted
24 conversations that comes late in the trial.

25 THE COURT: All right.

1 MR. WEINBERG: But for the purposes of today,
2 the -- there would also be an argument, as we made last
3 time at the conclusion of the government's proof, that
4 not only should the case not go to the jury factually,
5 but your Honor has the right to take it away from them
6 not on an insufficiency of proof, but on an
7 overbroadening by the government.

8 THE COURT: And we'll deal with that at the
9 appropriate time. All right, I think I understand your
10 argument.

11 MR. WEINBERG: But just one point. Which is the
12 Court said that the cases indicate that a payment to a
13 third-party, if it was intended to cause a breach of
14 honest services, is enough to prove the government
15 cases. All of them, your Honor, each one of them, and
16 we argued it last time, is distinguished from this case
17 by two factors. One is zero communications between him
18 and the public official, never met him, never gave him a
19 value, never said a word to him.

20 Number 2, and more important, is that in those
21 cases the public officials engineered the payment to the
22 third-party. Here the third-party, the middleman, the
23 CHS, is asking for the money and charging as a lobbyist
24 and wanting to know how much money he's getting paid.
25 The public official didn't put the relative out there to

1 get money like the golf -- the example, "I'm going to
2 get my kid to win 40,000 bucks at a hole-in-one golf
3 tournament, or the political cases where the political
4 figure benefited by giving jobs to all of his people.
5 Here there's no involvement of the public official, all
6 of it is between the relative and Mr. O'Brien and then
7 the FBI comes in. And at one point he says, "Why don't
8 I sit with the public official?" "No." The government
9 could have -- we didn't need to have uncertainty, they
10 could have taped him talking to the public official and
11 the relative said, "Oh, no, you're not going to talk to
12 my relative." So that's my argument on probable cause.

13 THE COURT: Thank you.

14 I'll hear the government.

15 MS. BARCLAY: Yes, your Honor. Just quickly on
16 probable cause, because I think the government
17 essentially rests on its briefing with respect to the
18 motions to dismiss, but as your Honor said, it fits this
19 statute, understanding that there are differences among
20 the various factual scenarios of the cases that we
21 cited.

22 THE COURT: Well what do you say to what he says
23 are the two crucial factual differences?

24 MS. BARCLAY: So, your Honor, what I say about
25 those is that this was a -- this was an operation, an

1 undercover operation where there was also a desire to
2 protect the integrity of the marijuana process, right?
3 So, um, there was no direct communication between
4 Mr. O'Donovan and the Police Chief because the police
5 Chief was walled off from the investigation to ensure
6 that the process that they were going through was not
7 impacted by the attempted buy.

8 THE COURT: I didn't mean that in any, um,
9 pejorative way, but you acknowledge that the cases
10 don't -- that this case is different from those cases
11 where the public official -- I'm borrowing
12 Mr. Weinberg's phraseology and maybe I should not, "put
13 the third-party out there." This is different. You're
14 not going to be able to prove, because the public
15 official was walled off --

16 MS. BARCLAY: Right.

17 THE COURT: -- that he put the relative out there.
18 That's different?

19 MS. BARCLAY: Right, but this was Mr. O'Donovan
20 putting the third-party out there. So perhaps it's a
21 distinction without a difference. Because it's his
22 intent that governs here, and his intent was to pay the
23 close reactive, the Police Chief, in exchange for the
24 chief's official action.

25 So it's the same intent, it's Mr. O'Donovan making

1 the suggestion or making the approach here, which is
2 slightly different than some of the cases Mr. Weinberg
3 --

4 THE COURT: Right, you're saying it's different
5 but legally it is not material?

6 MS. BARCLAY: Right.

7 THE COURT: Okay, I understand that.

8 MS. BARCLAY: And with respect to the second, the
9 public -- I think he said that there was, um -- "The
10 public official engineers payments to the third-party
11 and there was no communication." I guess they're one
12 and the same. Just the fact of the matter is it's the
13 intent of Mr. O'Donovan that the government will have to
14 prove here and he's the one who approached the close
15 relative of the Police Chief with the intention of
16 paying that relative in exchange for the chief's
17 official action.

18 So that's with respect to probable cause, your
19 Honor. If you want me to address the general warrant,
20 I'm happy to do that. I think your Honor with the cases
21 --

22 THE COURT: I don't think it's necessary. I do
23 want -- I did want to hear from you.

24 All right, here's the ruling of the Court. And
25 we'll deal with the issues in the order that

1 Mr. Weinberg raised them.

2 On the issue of whether this is a general warrant.
3 In light of the controlling cases and persuaded really
4 by my colleague Judge Saris's reasoning, this Court
5 concludes that it was not a general warrant.

6 Second, with respect to the challenge to the two
7 specific categories. In light of the processes set
8 forth by the applicable rules of criminal procedure,
9 again this is not the time to suppress those processes
10 from going forward or enter any blanket suppression
11 order. I will expect that the government's exhibits
12 will be set forth by the time of the final pretrial
13 conference in this case, at which time the Court can
14 address any issues as to whether they were properly
15 seized under these warrants in this case.

16 With respect to the issue of probable cause. Upon
17 reflection, the Court denies the motion to dismiss
18 insofar as this Court has kept it under advisement,
19 because the indictment is, um, sufficient under the
20 statute to withstand dismissal. The Court does not now,
21 nor need it, express a legal opinion on the admitted
22 factual differences between this case and the decided
23 cases which have allowed honest services convictions to
24 stand for two reasons. One, we may have further
25 guidance from the Supreme Court of the United States.

1 And, two, the government is correct that Mr. O'Donovan's
2 intent is the overriding concern here.

3 So having denied the motion to dismiss, it follows
4 that the Court here, within that framework, also denies
5 these motions to suppress. The rights of Mr. O'Donovan
6 are saved.

7 That's the order of the Court. We'll adjourn.
8 We'll recess.

9 (Ends, 2:35 p.m.)

10

11 C E R T I F I C A T E

12

13 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do
14 hereby certify that the forgoing transcript of the
15 record is a true and accurate transcription of my
16 stenographic notes, before Judge William G. Young, on
17 Monday, December 19, 2022, to the best of my skill and
18 ability.

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/s/ Richard H. Romanow 01-12-2023

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RICHARD H. ROMANOW Date

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